

Entered by: 1MB D.C.

Apr. 30, 2009

STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
09-80645-Civ-DIMITROULEAS/SNOW

ADAM COHN, Individually, and on Behalf of All Others Similarly Situated,

V.

Case No.

COMPLAINT

Plaintiff Adam Cohn (“Cohn”), individually and on behalf of all others similarly situated, by and through their undersigned counsel, for their Complaint against Defendant Premium Capital Funding, LLC d/b/a Top Dot Mortgage (“Top Dot”), David Brown, Kolman Brown, Frank Fiore and Daniel Mansi (“Mansi”) (collectively “Defendants”) state as follows:

JURISDICTION AND VENUE

1. Plaintiff brings this collective action under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§201 *et seq.*, to recover unpaid minimum wages, overtime compensation and other relief pursuant to 29 U.S.C. §216(b).
2. Jurisdiction over Plaintiff’s FLSA claims is based upon Section 16(b) of the FLSA, 29 U.S.C. §16(b), and upon 28 U.S.C. §1331.
3. Venue in this District is appropriate under 28 U.S.C. §1391(b)(2) because a substantial part of the events giving rise to these claims occurred in this judicial district.

PARTIES

4. Plaintiff Cohn is a former loan officer employed by Defendants who has been subjected to Defendants' illegal compensation practices.
5. Plaintiff was employed by Defendants as a loan officer in this judicial district within the last three years.
6. Pursuant to 29 U.S.C. §216(b) of the FLSA, Plaintiff's written consent to become party Plaintiff is attached as Exhibit A.
7. Defendants provide mortgage banking services to consumers in the State of Florida.
8. At all relevant times, Top Dot has been an employer as defined by the FLSA, 29 U.S.C. §203(d).
9. At all relevant times, David Brown, Kolman Brown, Frank Fiore and Daniel Mansi have been "employers" as defined by the FLSA, 29 U.S.C. § 203(d).
10. At all relevant times, Defendant David Brown has been an owner, Director and President of Top Dot. In this capacity, David Brown exercised operational control over Top Dot; controlled significant business functions of Top Dot; determined employee salaries and made hiring decisions; and acted on behalf of and in the interest of Top Dot in devising, directing, implementing, and supervising the wage and hour practices and policies relating to Top Dot Loan Officers challenged in this Complaint. As such, at all relevant times, Defendant David Brown has been an employer under the FLSA.
11. At all relevant times, Defendant Kolman Brown has been an executive of Top Dot. In this capacity, Kolman Brown exercised operational control over Top Dot; controlled significant business functions of Top Dot; determined employee salaries and made hiring decisions; and acted on behalf of and in the interest of Top Dot in devising,

directing, implementing, and supervising the wage and hour practices and policies relating to Top Dot Loan Officers challenged in this Complaint. As such, at all relevant times, Defendant Koman Brown has been an employer under the FLSA.

12. At all relevant times, Defendant Frank Fiore has been an owner, Director and Treasurer of Top Dot. In this capacity, Frank Fiore exercised operational control over Top Dot; controlled significant business functions of Top Dot; determined employee salaries and made hiring decisions; and acted on behalf of and in the interest of Top Dot in devising, directing, implementing, and supervising the wage and hour practices and policies relating to Top Dot Loan Officers challenged in this Complaint. As such, at all relevant times, Defendant Frank Fiore has been an employer under the FLSA.

13. At all relevant times, Defendant Mansi has been an executive of Top Dot. In this capacity, Mansi exercised operational control over Top Dot; controlled significant business functions of Top Dot; determined employee salaries and made hiring decisions; and acted on behalf of and in the interest of Top Dot in devising, directing, implementing, and supervising the wage and hour practices and policies relating to Top Dot Loan Officers challenged in this Complaint. As such, at all relevant times, Defendant Mansi has been an employer under the FLSA.

FACTS

14. Defendants operate a mortgage bank or brokerage company that has been operating in the mortgage business for at least the past three years.

15. Plaintiff and other similarly situated persons are current and former loan officers who have been employed by Defendants in the State of Florida.

16. All loan officers employed by Defendants during the applicable limitations periods have had essentially the same job duties.
17. Pursuant to Defendants' uniform written company-wide polices and procedures, Plaintiff's primary duty was to sell residential mortgage loans over the telephone.
18. Defendants employed other individuals whose primary duty had been to sell residential mortgage loans over the telephone (hereinafter referred to as "loan officers").
19. Defendants have employed other loan officers who have performed the same or similar duties as Plaintiff.
20. Defendants managed Plaintiff's employment as well as all other loan officers' employment, including the amount of overtime worked. Defendants dictated, controlled, and ratified the wage and hour and all related employee compensation policies of Top Dot.
21. Defendants' wage and hour practices and policies have been uniform and centrally disseminated.
22. Per Defendants' uniform companywide practices and policies, Plaintiff and all similarly situated loan officers have been compensated primarily on a commission only basis.
23. Per Defendants' uniform companywide practices and policies, Plaintiff and all similarly situated loan officers did not receive a guaranteed salary.
24. Per Defendants' uniform companywide practices and policies, Plaintiff and all similarly situated loan officers routinely worked in excess of 40 hours per week without receiving overtime compensation.

25. Defendants failed to maintain accurate time records as required by the FLSA, 29 C.F.R. §516.2(a)(7).

GENERAL ALLEGATIONS

26. Plaintiff reasserts and re-alleges the allegations set forth in each of the paragraphs above.

27. Plaintiff Cohn individually, and on behalf of all similarly situated current and former employees of Defendants, including their subsidiaries and affiliated companies, brings this action as a Florida collective class action under the FLSA to recover, *inter alia*, unpaid minimum wage and overtime compensation, liquidated damages, and statutory penalties owed to Plaintiff and all other similarly situated loan officers employed by, or formerly employed by, Defendants, including their subsidiaries and affiliated companies.

28. Defendants' routine practice of failing to pay Plaintiff and all similarly situated employees minimum wages and overtime compensation when these employees worked in excess of 40 hours per week violates the FLSA.

29. Defendants failed to pay overtime wages to Plaintiff and other similarly situated loan officers during their employment by intentionally, willfully, and improperly designating the position of loan officer as exempt from the minimum wage and overtime requirements of the FLSA.

30. As a result of Defendants' unlawful companywide practices and policies, Plaintiff and the similarly situated employees have suffered a loss of wages.

COLLECTIVE ACTION ALLEGATIONS OF THE
FLSA CLASS OF LOAN OFFICERS

31. Plaintiff reasserts and re-alleges the allegations set forth in each of the paragraphs above.

32. Plaintiff seeks to maintain this suit as a collective action pursuant to 29 U.S.C §216(b) on behalf of themselves and the following class of persons:

All persons who worked as Premium Capital Funding d/b/a Top Dot loan officers in Florida at any time during the statutory period who give their consent in writing to become party plaintiffs (“the FLSA Class”).

33. Plaintiff and other members of the FLSA Class are similarly situated because, *inter alia*, they have all had similar duties; performed similar tasks; been subjected to the same requirements under the FLSA to be paid minimum wages and overtime wages unless properly exempted thereunder; been subjected to similar pay plans; been required to work and have worked in excess of 40 hours per week; been required to work without payment of minimum wages, and have not been paid at a rate of 1.5 times their respective regular rates of pay for all overtime hours worked.

34. Section 13 of the FLSA, 29 U.S.C. §213, exempts certain categories of employees from the overtime pay requirements set forth in Section 207(a)(1) of the FLSA, 29 U.S.C. §207(a)(1) of the FLSA. None of the FLSA’s overtime exemptions apply to Plaintiffs or the other members of the FLSA Class because, *inter alia*, they have not been paid on a salary basis and have not otherwise met the requirements for coverage under any exemptions. Moreover, upon information and belief, loan officers were and are subject to pay deductions by Defendants that defeat any claim to exemption.

35. Defendants have encouraged, permitted and required Plaintiff and other members of the FLSA Class to work more 40 hours per week without overtime compensation.

36. Defendants have known that Plaintiff and other members of the FLSA Class have performed work that has required overtime compensation. Nonetheless, Defendants have operated under a scheme to deprive Plaintiff and other members of the FLSA Class of overtime compensation by failing to properly compensate them for all time worked.

37. Defendants have acted willfully and have known or shown reckless disregard for the matter of whether their conduct has violated the FLSA, and have not acted in good faith with respect to the conduct alleged herein.

COUNT I

VIOLATION OF THE FAIR LABOR STANDARDS ACT OF 1938
29 U.S.C. §201 ET SEQ., FAILURE TO PAY MINIMUM WAGES

38. Plaintiff reasserts and re-alleges the allegations set forth in each of the paragraphs above.

39. The FLSA regulates the payment of wages by employers whose employees are “engaged in commerce or engaged in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce.” 29 U.S.C. §207(a)(1).

40. Defendants are subject to the minimum wage requirements of the FLSA because Top Dot is an enterprise engaged in commerce and its employees are engaged in commerce.

41. At all times material to this action, Plaintiff and all members of the FLSA Class have been entitled to the rights, benefits, and protections granted by the FLSA, 29 U.S.C. §201, *et. seq.*

42. Defendants routinely and regularly failed to pay class members the applicable minimum hourly wage, in violation of 29 U.S.C. §206(a). As a result of Defendants' unlawful practices, Plaintiff suffered a loss of wages.

COUNT II

VIOLATION OF THE FAIR LABOR STANDARDS ACT OF 1938
29 U.S.C. §201 ET SEQ., FAILURE TO PAY OVERTIME

43. Plaintiff reasserts and re-alleges the allegations set forth in each of the paragraphs above.

44. Section 207(a)(1) of the FLSA states that an employee must be paid overtime, equal to at least 1.5 times the employee's regular rate of pay, for all hours worked in excess of 40 hours per week.

45. By the above-alleged conduct, Defendants violated the FLSA by failing to pay members of the FLSA Class overtime compensation as required by the FLSA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, by and through their attorneys, demand judgment against the Defendants and in favor of Plaintiff and all others similarly situated, for a sum that will properly, adequately and completely compensate them for the nature, extent and duration of their damages, the costs of this action and as follows:

- A. Order Defendants to file with this Court and furnish to counsel a list of all FLSA Class Members;
- B. Authorize Plaintiffs' counsel to issue notice at the earliest possible time to FLSA Class Members, informing them that this action has been filed, of the nature of the action, and of their right to opt-in to this lawsuit;
- C. Declare and find that Defendants committed one or more of the following acts:

- i. Willfully violated the minimum wage provisions of the FLSA; and,
- ii. Willfully violated the overtime provisions of the FLSA;

D. Award compensatory damages, including all minimum wage and overtime compensation owed, in an amount according to proof;

E. Award liquidated damages;

F. Award interest on all unpaid compensation due accruing from the date such amounts were due;

G. Award all costs and attorney's fees incurred in prosecuting this action;

I. Grant leave to add additional Plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court; and

J. Provide such further relief as the Court deems just and equitable.

JURY DEMAND

Plaintiffs demand trial by jury.

Dated: April 29, 2009

Respectfully Submitted


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09-80645-CIV-DIMITROULEAS/SNOW
CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

NOTICE: Attorneys MUST Indicate All Re-filed Cases

Apr. 30, 2009

STEVEN M. LARIMORE
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S.D. OF FLA. - MIAMI

I. (a) PLAINTIFFS

Adam Cohn

(b) County of Residence of First Listed Plaintiff Palm Beach County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Robert S. Norell, P.A.

7350 NW 5th Street Plantation, FL 33317

Tel. 954-617-6017

DEFENDANTS

Premium Capital Funding, LLC d/b/a Top

Brown, Kolman Brown, Frank Fiore and Daniel Mansi

County of Residence of First Listed Defendant Palm Beach County

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT
LAND INVOLVED.

Attorneys (If Known)

09cv80645-WPO/JSS

(d) Check County Where Action Arose: MIAMI- DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE
HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF	PTF	DEF	
Citizen of This State	<input type="checkbox"/>	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/>	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/>	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	28 USC 157	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PROPERTY RIGHTS	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 371 Truth in Lending	SOCIAL SECURITY	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 861 HIA (1395f)	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	FEDERAL TAX SUITS	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	Habeas Corpus:	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Tort to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities Employment	<input type="checkbox"/> 540 Mandamus & Other		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities Other	<input type="checkbox"/> 550 Civil Rights		<input type="checkbox"/> 950 Constitutionality of State Statutes
		<input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Re-filed- (see VI below) 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S).

(See instructions second page):

a) Re-filed Case YES NO

b) Related Cases YES NO

DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):

29 U.S.C. §216(b)

LENGTH OF TRIAL via 4-5 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO
THE BEST OF MY KNOWLEDGE

SIGNATURE OF ATTORNEY OF RECORD

DATE

April 29, 2009



FOR OFFICE USE ONLY

AMOUNT 350

RECEIPT # 546157

IFP